No. 83-2146

In The

Supreme Court of the United States

October Term, 1984

RICHARD WILSON and MARTIN VIGIL,

Petitioners,

v.

GARY GARCIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

BRUCE HALL
Counsel of Record
DIANE FISHER
BEN M. ALLEN
JILL E. ADAMS

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

ARGUMENT

I. The Court Below Erred In Undertaking An Independent Search For The Appropriate State Limitations Period.

A. State Law Provides the Statute of Limitations in a § 1983 Action and the Limitations Period Identified by a State's Highest Court Cannot Be Rejected Unless Inconsistent With the Constitution and Laws of the United States.

Respondent Gary Garcia, the Plaintiff below (hereinafter the Plaintiff), misconstrues this Court's decision in *Burnett v. Grattan,* 104 S. Ct. 2924 (1984). In *Burnett,* the Court identified the task imposed by 42 U.S.C. § 1988 (hereinafter § 1988) as a three-step process. The first step is to determine whether any federal law on point exists. "If no suitable federal rule exists, courts undertake the second step by considering application" of state law. The third step involves an inquiry into whether the state law otherwise applicable is inconsistent with the Constitution and laws of the United States. Section 1988 protects the federal interest by rejecting state law found to be inconsistent with federal law. 104 S. Ct. at 2929.

The Plaintiff claims that the first step of the process identified in *Burnett* requires "the essential nature of the federal action [to be] characterized according to federal law." Respondent's Brief at 13. This claim, however, ignores the *Burnett* Court's observation that where statutes of limitations for actions brought under 42 U.S.C. § 1983 (hereinafter § 1983) are concerned, the first step of the § 1988 analysis raises no issue:

> On several occasions, this Court has rejected arguments that a particular federal statute of limitations applied. . . . It is now settled that federal courts will

turn to state law for statutes of limitations in actions brought under these civil rights statutes.

104 S. Ct. at 2929 (citations omitted). Federal law which might supply a rule of decision in the selection of a limitations period does not exist; it is "settled" that state law is the only source for the applicable rule. The starting point of the analysis in this case, therefore, is the second step of the *Burnett* analysis: the identification of the statute of limitations "which the State would apply if the action had been brought in a state court." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 469 (1975) (Marshall, J., concurring in part and dissenting in part).

Unlike *Burnett*, the instant case arose in a state whose highest court has already made the required identification. *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982). The only step left for the federal court thus is an analysis of whether the application of the state law so identified is inconsistent with federal law. The Plaintiff in his brief offers no justification for the Tenth Circuit's summary dismissal of New Mexico law as announced in *DeVargas* other than the attraction of fashioning a federal common law of characterization in order to help identify state law. This approach to limitations problems, however, was rejected by this Court in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Because the applicable law in this case has been identified by the state, the court below erred in engaging in an independent analysis of the Plaintiff's claim to identify the applicable state law. *See* Brief for Petitioners at 7-24.

B. Borrowing State Law in a § 1983 Action Is Consistent With the History and Purpose of § 1983.

The Civil Rights Act of 1871 was intended to provide a federal remedy where state remedies were likely to be abridged or unavailable. *Allen v. McCurry*, 449 U.S. 90, 98 (1980). Thus, § 1983 does not create substantive rights; it creates only a remedy. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618 (1979). While Congress did not trust the states to provide that remedy, *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978), it did trust state law to provide appropriate rules to guide the litigation of the federal claim in areas Congress did not choose to address. *Tomanio;* 42 U.S.C. § 1988. One such area involves statutes of limitations.[1] *Burnett.*

This Court has held that state policies of repose are not disfavored by the Civil Rights Act, *Board of Regents v. Tomanio*, and that state laws of limitations apply to

---

[1] The remarks of Representative Sheldon regarding the Civil Rights Act are pertinent: "Convenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authorities except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed upon them. The local authorities ought to understand best the wants and condition of the people over whom they rule. It is essential to the maintenance of peace and order, and to the inculcation of respect for and obedience to law, that the State governments should be respected and upheld by the General Government. It is as much the duty of the national Government to support that of the State, and to maintain its authority, as it is to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen." Cong. Globe, 42d Cong., 1st Sess. 368 (1871).

civil rights actions unless found to be inconsistent with federal law. *Id.* This recognition of policies of federalism in § 1983 actions is consistent with the Court's historical deference to state policies in other circumstances where state law has been used to "fill in the gaps" in federal law. In *Board of County Commissioners v. United States*, 308 U.S. 343 (1939), this Court stated,

> Nothing seems to us more appropriate than due regard for local institutions and local interests. . . . In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved [litigants] in their relation with the states or their political subdivisions.

Id. at 351-52 (holding that state law barring recovery of interest from a county for taxes wrongfully collected was applicable to Indian taxpayers from whom the county had collected taxes in violation of federal law); *see also Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 154-55 (1944). The Tenth Circuit's summary dismissal of New Mexico state law and its substitution of an ad hoc rule of federal common law was therefore improper.[2]

---

[2] Even those circuits that have arguably adopted a "uniform" approach to characterization similar to that adopted by the court below, e.g., *Garmon v. Foust*, 668 F.2d 400 (8th Cir.), *cert. denied*, 456 U.S. 998 (1982); *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962), have applied limitations periods to civil rights actions that derive from statutes of limitations specifically applicable to actions against public officials rather than statutes applicable to the characterization otherwise adopted, e.g., *Foster v. Armontrout*, 729 F.2d 583 (8th Cir. 1984); *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982); *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981). See Point II *infra*.

C. Applicable New Mexico Law Holds That a § 1983 Claim Against Law Enforcement Officers Is Barred by the Two-Year Statute of Limitations Set Forth in N.M. Stat. Ann. § 41-4-15 (1978).

The Plaintiff in his brief appears to argue that the Tenth Circuit properly declined to follow *DeVargas* because *DeVargas* presents an incorrect analysis of state law. Brief for Respondent at 23-32. Not only is this argument irrelevant, as the only relevant issue is whether *DeVargas* is state law, this argument is also incorrect.[3]

---

[3] The Plaintiff's attempt to discount the New Mexico Supreme Court's opinion in *DeVargas* because that opinion was rendered in the form of an order quashing a writ of certiorari lacks merit. The concurring opinion of Judge Sutin in *Gonzalez v. Stanke-Brown & Associates, Inc.*, 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982), on which the Plaintiff relies, is not on point. The discussion in that case on the impact of an order quashing certiorari concerned an order of the New Mexico Supreme Court which was entered without a published opinion. By rule, such an order has no precedential value. N.M. S. Ct. Misc. R. 7. An order of the New Mexico Supreme Court which is accompanied by a published opinion, however, carries the same precedential value as any other published opinion of that court: whether the opinion is issued as a decision quashing certiorari or as a decision affirming or reversing a judgment is irrelevant. N.M. S. Ct. Misc. R. 7; *see Sena School Bus Co. v. Board of Education*, 101 N.M. 26, 30, 677 P.2d 639, 643 (Ct. App. 1984) (citing *DeVargas*); *Cozart v. Town of Bernalillo*, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983) (citing *DeVargas*); *see also LaBarge v. Stewart*, 84 N.M. 222, 224, 501 P.2d 666, 668 (Ct. App.), *cert. denied*, 84 N.M. 219, 501 P.2d 663 (1972) (citing *Taos Ski Valley, Inc. v. Elliott*, 83 N.M. 763, 497 P.2d 974 (1972), an opinion quashing a writ of certiorari); *Williams v. Town of Silver City*, 84 N.M. 279, 288, 502 P.2d 304, 313 (Ct. App.), *cert. denied*, 84 N.M. 271, 502 P.2d 296 (1972) (Sutin J., partially concurring and dissenting); *cf. State v. Reese*, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977). Thus, it matters little that the

(Continued on following page)

In *DeVargas* both the New Mexico Court of Appeals and the New Mexico Supreme Court found that the most appropriate limitations period for a § 1983 action filed in state court against law enforcement officers was that set forth in N.M. Stat. Ann. § 41-4-15 (1978), which provides a two-year limitations period for "actions against a governmental entity or a public employee for torts." 97 N.M. at 564, 642 P.2d at 167 (Supreme Court); 97 N.M. 447, 450-51, 640 P.2d 1327, 1330-31 (Ct. App. 1981). The Plaintiff argues that because § 41-4-15 uses the word "torts" rather than the words "constitutional torts," the *DeVargas* courts erred in finding that § 41-4-15 applies to § 1983 claims.

The fact that a tort may not be identical to a constitutional deprivation, however, does not mean that such claims are not analogous, *see Parratt v. Taylor*, 451 U.S. 527 (1981), or that § 41-4-15 does not apply to both types of claims, *see Graffals Gonzalez v. Garcia Santiago*, 550 F.2d 687 (1st Cir. 1977). The New Mexico Supreme Court's holding in *DeVargas* that § 41-4-15 applies to torts and constitutional torts alike is a dispositive holding that under New Mexico law § 41-4-15 is in fact applicable to constitutional torts such as those raised by the Plaintiff in this case. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 484-85 (1981) (Stevens, J., dissenting)

(Continued from previous page)

result of the opinion in DeVargas was to quash a writ of certiorari. See also Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (cited authoritatively in Cook v. Hudson, 429 U.S. 165 (1976); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183 (1959); Dick v. New York Life Insurance Co., 359 U.S. 437, 450 (1959) (Frankfurter, J., dissenting)).

("Even if the state court should tell us that a state statute has a meaning that we believe the state legislature plainly did not intend, we are not free to take our own view of the matter.").

The decision in *Wells v. County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982), on which the Plaintiff relies, does not undermine the holding of *DeVargas*. In *Wells* the New Mexico Supreme Court addressed the question of whether the exclusive remedy provision of the New Mexico Tort Claims Act (hereinafter the Act), N.M. Stat. Ann. § 41-4-17(A) (1978), barred a plaintiff from proceeding under the Act if the plaintiff also brought a claim under 42 U.S.C. § 1983 by reason of the same occurrence or chain of events.[4] The court concluded that the supremacy clause would be violated if the Act were interpreted so as to have a chilling effect on the plaintiff's ability to exercise his federal rights, and thus held that the Act's exclusivity provision did not prohibit suit if the plaintiff also sought relief under § 1983.

The court in *Wells* recognized a distinction between a § 1983 claim and a tort claim in the context of recognizing that not all torts committed under color of law amount to constitutional deprivations, but also recognized that "a Section 1983 action is a species of tort liability," 98 N.M.

---

[4] Section 41-4-17(A) provides in part that "[t]he Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim."

at 5, 644 P.2d at 519. While the distinction noted in *Wells* was relevant in that case because it led to the possible chilling effect of the exclusivity provision,[5] such a distinction is not relevant for purposes of § 41-4-15, and does not undermine the analogy drawn in *DeVargas*.

The *DeVargas* courts did not find that torts and § 1983 claims are identical. The courts in *DeVargas* found only that a cause of action under N.M. Stat. Ann. § 41-4-12 (1978) was the most analogous state claim to the § 1983 claim there at issue. Section 41-4-15 was deemed the applicable limitations period because it applies to § 41-4-12 claims and, by the analogy required by *Board of Regents v. Tomanio*, therefore applied to the plaintiff's § 1983 claims.[6] The analogy between § 41-4-12 claims and § 1983

---

[5] If there were no difference between a tort claim and a § 1983 claim, a plaintiff would not lose anything if he lost the right to bring one claim upon bringing the other. Principles against double recovery or the doctrine of *res judicata* would negate the purpose of bringing the second claim in any event. It is important to be able to bring both claims because damages may be different and because the conduct complained of may not be of constitutional dimension but may still warrant recovery under the Act.

[6] The *DeVargas* decision is determinative of the Plaintiff's claim against Petitioner Wilson and is also determinative of the statute of limitations applicable to the Plaintiff's claim against Petitioner Vigil, Chief of the New Mexico State Police. The Plaintiff's claim against Vigil is premised on negligent hiring and negligent supervision theories. *DeVargas* involved a claim against the warden of the New Mexico penitentiary. The complaint alleged that the warden "failed to take adequate action to remove [the unqualified] employees from their positions as guards and, generally, was negligent in his training, supervision and disciplining of these employees." *DeVargas*, 97 N.M. at 450, 640 P.2d at 1330 (Ct. App.). The *DeVargas* court held that the plaintiff's claim against the warden was governed by the two-year limitations period of § 41-4-15. 97 N.M. at 564, 640 P.2d at 167 (Sup. Ct.). Thus, it is clear that the *DeVargas* decision is controlling with respect to any claim in this case against Vigil.

claims based upon police brutality is not undermined by recognition of the obvious fact that there is some difference between ordinary torts and claims of constitutional deprivation.[7] The fact that the word "torts"—when used in a different context in a different statutory section—has been interpreted not to include claims under § 1983 does not negate the fact that the limitations period set forth in § 41-4-15 applies equally to torts and to analogous claims, including constitutional torts.[8]

II. Application Of § 41-4-15 To This Case Is Not Inconsistent With Federal Law Or The Policies Of Compensation And Deterrence Embodied In § 1983.

Because New Mexico law is clear, § 41-4-15 must be applied to the Plaintiff's § 1983 claims unless the application of that statute is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988; *see Burnett*. The Plaintiff argues that the application of § 41-4-15 to his § 1983 claims is inconsistent with federal law because (1) this statute of limitations is codified in the New Mexico Tort Claims Act and (2) the statute imposes a two-year limitations period specifically applicable to actions against public entities and public employees. Neither

---

[7] The continuing vitality of *DeVargas* is highlighted by the post-*Wells* reliance on *DeVargas* by the New Mexico Court of Appeals. *See Sena School Bus Co.*, 101 N.M. at 30, 677 P.2d at 643; *Cozart v. Town of Bernalillo*.

[8] *See Wells*, 98 N.M. at 5, 644 P.2d at 519 ("a Section 1983 action is a species of tort liability"). *See also Parratt; Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); S. Rep. No. 588, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789 (reference to *Bivens* action as an action for constitutional torts).

of these attributes, however, evidences hostility on the part of the state to the Plaintiff's federal claim, and therefore does not provide a basis on which to hold the application of § 41-4-15 inconsistent with federal law.[9]

The Plaintiff first argues that the application of § 41-4-15 to § 1983 claims would be inconsistent with federal law because the New Mexico Tort Claims Act is an Act in "derogation of rights [of a] civil rights litigant." Brief for Respondent at 28. The Defendants, however, do not seek to apply all provisions of the Act to the Plaintiff's claims—only the statute of limitations codified therein.[10]

The fact that a statute of limitations is codified in a Tort Claims Act does not, in itself, create an inconsistency with federal law within the meaning of § 1988. *See Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Nored v. B'ekm*, 743 F.2d 1386 (9th Cir. 1984) (per curiam); *Kosikowski v. Bourne*. The Plaintiff's reliance on Ninth Cir-

---

9 The Plaintiff in his brief claims that the Tenth Circuit "implicitly found" § 41-4-15 to be inconsistent with federal law. Brief for Respondent at 12. This is incorrect. The Tenth Circuit simply disregarded that statute, and never addressed the issue of inconsistentency. *Garcia v. Wilson*, 731 F.2d 640, 651 n.5 (10th Cir. 1984).

10 The Plaintiff seeks support for his position in *Burnett v. Grattan*. *Burnett*, however, is distinguishable on its facts. The issue in that case was whether a state limitations period applicable to the filing of an administrative claim was applicable to a § 1983 action. The Court quite properly noted that the legislative intent behind the enactment of an administrative scheme was likely to be at variance with the intent in enacting a statute of limitations for a judicial action. In addition, the Plaintiff ignores the fact that New Mexico has had a statute of limitations specifically applicable to governmental entities or public employees since 1880, almost 100 years before the enactment of the Tort Claims Act.

cuit cases such as *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970), must be read in light of that court's subsequent decision in *Kosikowski* which approved the use of a limitations period set forth in the Oregon Tort Claims Act. The Plaintiff, in fact, has cited to no decision which has held that a reasonable limitations period identified by a state as applicable to § 1983 actions is inconsistent with federal law merely because it is codified in a tort claims act.[11]

The Plaintiff also argues that because § 41-4-15 provides a shorter period of time for actions against governmental entities and public employees than for similar actions against other defendants, it is inconsistent with federal law. This argument also lacks merit.

The principal early case discussing whether a state statute of limitations is inconsistent with federal policy

---

11 The Plaintiff seeks to avoid the application of § 41-4-15 by arguing that the use of this limitations period would require the impermissible application to his § 1983 claim of the 90-day notice provision set forth in an entirely different statutory section of the New Mexico Tort Claims Act. This argument, however, is a red herring. No New Mexico opinion has suggested that the notice provision of N.M. Stat. Ann. § 41-4-16 (1978) applies to § 1983 claims. By its terms, § 41-4-16 applies only to actions against the state or a local public body and not to actions against public officials. *Martinez v. City of Clovis*, 95 N.M. 654, 625 P.2d 583 (Ct. App. 1980). In addition, this statute applies only to those who claim damages "under the Tort Claims Act." One who claims under § 1983, therefore, is not encompassed by this provision. (In contrast, § 41-4-15 applies to all claims against governmental entities or employees "for torts.") The Tenth Circuit has specifically ruled that short-period notice provisions of state tort claims acts are inapplicable to § 1983 claims, *Childers v. Independent School District No. 1*, 676 F.2d 1338 (10th Cir. 1982); *see also Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), and there is no reason to believe that New Mexico courts would interpret the notice provisions as applicable to a claim brought under § 1983.

is *Campbell v. City of Haverhill*, 155 U.S. 610 (1895). In *Campbell*, the Court was concerned with whether a state statute of limitations should apply to a federal patent infringement action which could be brought only in federal court. The Court concluded that the state limitations period should apply unless the period was either too short or discriminatory against the federal cause of action. *Id.* at 615.

At no point has the Plaintiff in this case argued that the two-year period provided in § 41-4-15 is too short. The Plaintiff nonetheless argues that because § 41-4-15 provides a shorter limitations period for actions against public employees than is provided for actions against others, application of this provision to § 1983 claims discriminates against the federal cause of action. The fact that § 41-4-15 applies equally to state and federal claims alike, however, negates any claim that § 41-4-15 discriminates against the federal action.

Cases holding that a state statute of limitations is discriminatory have done so on the ground that the statute involved applied only to federal claims. *E.g., Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978) (§ 1983); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946) (Fair Labor Standards Act); *Caldwell v. Alabama Dry Dock & Shipbuilding Co.*, 161 F.2d 83 (5th Cir.), *cert. denied*, 332 U.S. 759 (1947) (Fair Labor Standards Act); *Matthewman v. Akahane*, 574 F. Supp. 1510 (D. Hawaii 1983) (§ 1983); *see Nored v. Blehm.* In each of these cases, the court construed a state statute of limitations which, by its terms, was applicable only to federal actions. In each case the statute was ruled discriminatory because it provided a shorter period for

federal claims than for analogous state claims and because it deviated from the general limitations scheme of the state by categorizing actions with reference to the authority which created the right rather than by the nature of the right asserted. These infirmities are not present in § 41-4-15. Section 41-4-15 applies equally to state and federal claims, and although § 41-4-15 distinguishes between claims on the basis of the identity of the parties, it is not unique among New Mexico statutes in so defining a limitations period. *See, e.g.*, N.M. Stat. Ann. § 41-5-13 (1978) (limitations period for medical malpractice actions); N.M. Stat. Ann. § 37-1-8 (1978) (limitations period for actions against sureties); *see also Armijo v. Tandysh*, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794, *cert. denied*, 459 U.S. 1016 (1982) (upholding different rules of accrual for wrongful death actions based on medical malpractice and other wrongful death actions).

The court in *Matthewman v. Akahane* addressed the difference between a statute applicable only to federal statutory claims and one applicable to both state and federal claims. The court distinguished the limitations provision at issue in *Kosikowski v. Bourne* from the Hawaii statute before the court in *Akahane* on the ground that since the limitations period at issue in *Kosikowski* applied to state claims arising under the tort claims act as well as to federal claims arising under § 1983, the statute did not discriminate against the federal action. The statute at issue in the case at bar is identical to the statute at issue in *Kosikowski:* it does not discriminate against federal causes of action because both state and federal claims against public employees are governed by the same limitations

period. *See Nored v. Blehm* (rejecting a claim that the Oregon statute of limitations applicable to § 1983 actions was invalid because it differentiates between governmental and private parties); *cf. Metcalf v. City of Watertown,* 153 U.S. 671 (1894) (state limitations statute applicable to actions on judgments construed to avoid discrimination between actions based on judgments of state court and actions based on judgments of federal court sitting in the state).

Rejection of a state statute of limitations because it reflects state policies which do not undermine the federal right would conflict with decisions of this Court which have found that state policies should be recognized where possible. *See, e.g., Board of Regents v. Tomanio; Wallis v. Pan American Petroleum Corp.; Davies Warehouse Co. v. Bowles; Board of County Commissioners v. United States.* Thus, statutes specifically applicable to public officials have been applied in civil rights actions by at least five circuits. *See, e.g., Foster v. Armontrout* (three-year statute for actions against public officials applied rather than five-year limitation for actions on a statute or ten-year residual provision); *Aitchison v. Raffiani* (two-year New Jersey Tort Claims Act provision applied rather than six-year contract claim provision); *Kosikowski v. Bourne* (two-year Oregon Tort Claims Act provision applied rather than six-year limitation for actions on a statute); *Blake v. Katter* (five-year limitations period for actions against a public officer applied rather than two-year statute for injuries to the person); *Green v. Ten Eyck,* 572 F.2d 1233 (8th Cir. 1978) (three-year limitations period for claims against public officials applied rather than 180-day period applicable to discrimination in housing claims); *Peterson v. Fink,*

515 F.2d 815 (8th Cir. 1975) (Missouri three-year statute applicable to public officers applied to *Bivens* action rather than five-year provision applicable to claims for injury to the person); *Allen v. Fidelity & Deposit Co. of Maryland,* 515 F. Supp. 1185 (D.S.C. 1981), *aff'd without opinion* 694 F.2d 716 (4th Cir. 1982) (three-year provision for actions against sheriff applied); *Gipson v. Township of Bass River,* 82 F.R.D. 122 (D.N.J. 1979) (two-year New Jersey statute applicable to public entities applied rather than six-year provision applicable to injuries to property interests).

Where there is no evidence of hostility on the part of the state to the federal cause of action, there is no reason to avoid recognition of state interests. *Tomanio; Aitchison; see Kosikowski.* Because legislatures enact statutes of limitations with the welfare of the state and its citizens in mind, to refuse to recognize state interests where they are not hostile to federal interests is to divorce whatever statute of limitations is deemed applicable from the policy and reason which engendered it. *See Aitchison.* The result is a purely arbitrary, unreasoned application of a limitations period.

The appropriate analysis is exemplified by *Robertson v. Wegmann,* 436 U.S. 584 (1978). In *Robertson,* the Court was concerned with whether Louisiana survivorship law should be applied to a § 1983 action where, if applied, it would cause the action to abate. In determining whether the application of state law in *Robertson* would be inconsistent with federal policy, the Court noted that the purposes of § 1983 were to provide compensation for those who were deprived of their civil rights and to deter abuse by government officials. The Court reasoned that no of-

ficial would feel free to abuse the rights of another because of the possibility that that person would die without a survivor capable of bringing the action, and that the compensation goal would not be hindered by refusing to allow the executor of the estate to recover.

In the case at bar, neither the goal of deterrence nor the goal of compensation would be thwarted by requiring a plaintiff to bring his claim within two years. No official will feel free to abuse another because of the possibility that that person might wait more than two years before filing an action, and anyone who pursues his rights diligently and has a valid claim will be compensated. *See Board of Regents v. Tomanio,* 446 U.S. at 488 (neither the policy of deterrence nor the policy of compensation "is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years"). There is no basis, therefore, on which to hold that the application of § 41-4-15 to the Plaintiff's § 1983 claims would be inconsistent with federal law.

III. The Plaintiff Cannot Avoid The Application Of The Appropriate Limitations Period To The Case At Bar.

In Point III of his Brief, the Plaintiff argues that a decision of this Court applying a two-year limitations period to this action should be prospective only and should not affect the Plaintiff's claims. This argument is without merit, premised as it is on the Plaintiff's erroneous contention that applying a two-year limitations period to federal civil rights actions in New Mexico would constitute a clear break with precedent. *See Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).

The Plaintiff cites two decisions to establish the "clear past precedent" on which he relied: *Hansbury v. Regents of University of California,* 596 F.2d 944 (10th Cir. 1979), and *Gunther v. Miller,* 498 F. Supp. 882 (D. N.M. 1980). These two cases, however, simply do not justify the Plaintiff's position that any decision in this action that would otherwise be adverse to the Plaintiff should be applied only prospectively.

The Plaintiff's reliance on *Hansbury* is misplaced. The claim in *Hansbury* accrued in 1970, six years before § 41-4-15 was enacted.[12] The court in *Hansbury* thus did not even consider that statute. Reliance on a "judicial opinion which does not take the statute into account is misplaced." *Nored v. Bohm,* 743 F.2d at 1387 (refusing to apply *Kosikowski* prospectively). *Gunther v. Miller,* the other case on which the Plaintiff relies, is a district court decision which is not binding on any other court, even one within the same district. *Valencia v. Stearns Roger Manu-*

---

12 Subsection (B) of § 41-4-15 provides that, "The provisions of Subsection A of this section shall not apply to any occurrence giving rise to a claim which occurred before July 1, 1976." In addition, *Hansbury,* analogized to a contract claim, see *Zuniga v. AMFAC Foods, Inc.,* 580 F.2d 380 (10th Cir. 1978), *overruled in EEOC v. Caddis,* 733 F.2d 1373 (10th Cir. 1984), is factually distinct from the case at bar and did not involve an action against a public entity or employee.

facturing Co., 124 F. Supp. 670, 675 (D.N.M. 1954). If the Plaintiff relied on that decision, he did so unreasonably.[13]

Contrary to the Plaintiff's belief, the settled rule of law in effect in the Tenth Circuit prior to issuance of the opinion below was the rule expressed most explicitly in *Zuniga v. AMFAC Foods*, 580 F.2d at 384 n.3. The court there specifically held that an assessment of the conduct underlying a federal civil rights claim dictates the choice of the applicable limitations period. Under this rule, the Plaintiff's causes of action are, were and since 1976 have been subject to a limitations period of two years. N.M. Stat. Ann. § 41-4-15 (1978). See Brief for Petitioners at 24-38.

The Plaintiff's claim that applying a two-year limitations period to his action would represent a complete break with past precedent is untenable. At least one federal judge sitting in New Mexico has noted the "absence of clear guidelines or precedent," Pet. App. at 5, and judges in the District of New Mexico have applied varying statutes to federal civil rights claims. *Id.* Indeed, as the Tenth Circuit recognized in *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), it is the decision presently on review that constitutes a break with precedent. To subvert the state policies of repose implicit in § 41-4-15 by accepting the Plaintiff's argument of prospectivity would be erroneous. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) ("The [state's] limitations periods, while guaranteeing the protection of the civil rights laws

[13] The Plaintiff's alleged reliance on the publisher's annotations to the New Mexico Statutes does not merit a response.

to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."). This Court's decision should therefore be applied to the litigant now before the Court.

CONCLUSION

For the reasons stated above and in the Brief for Petitioners, the decision of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
By: DIANE FISHER
BEN M. ALLEN
EDWARD RICCO
JILL E. ADAMS
BRUCE HALL
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

Attorneys for Petitioners